ORIGINAL

NO. 89-5148

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

JOHNNY WATKINS,

Petitioner,

v.

EDWARD MURRAY, WARDEN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

**RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI**

MARY SUE TERRY
Attorney General of Virginia

FRANK S. FERGUSON*
Assistant Attorney General

*Counsel of Record

Supreme Court Building
101 North Eighth Street
Richmond, Virginia 23219

(804) 786-4624

QUESTION PRESENTED

WHERE THE IDENTICAL JURY INSTRUCTIONS IN THE SENTENCING PHASE OF PETITIONER'S TWO CAPITAL TRIALS DID NOT MENTION MITIGATING CIRCUMSTANCES OR CALL THEM TO THE ATTENTION OF THE JURY IN ANY MANNER, IS THERE AN UNACCEPTABLE RISK THAT THE JURY FAILED IN BOTH CASES TO PERFORM THEIR EIGHTH AMENDMENT OBLIGATION TO CONSIDER THE ASPECTS OF HIS CHARACTER AND RECORD THAT HE PROFFERED AS THE BASIS FOR A LIGHT SENTENCE?

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STATEMENT OF THE CASE

The Offenses

Petitioner Johnny Watkins was convicted in the Circuit Court for the City of Danville, Virginia, upon two separate charges of capital murder. As a result of those convictions, Watkins received two death sentences.

The first death sentence was imposed on July 13, 1984, following a trial by jury upon a charge of capital murder in the commission of armed robbery. That charge, along with related charges of robbery and use of a firearm in the commission of a felony, arose in the early morning hours of November 14, 1983, when Watkins entered a convenience store in which the only other person present was the clerk, Betty Jean Barker. Watkins approached the counter, requested a pack of cigarettes, and placed a $1.00 bill on the counter. When Ms. Barker turned to complete the transaction, Watkins shot her twice. Ms. Barker fell to the floor and Watkins went behind the counter, robbed her person, stole the cash drawer from the cash register, and fired two more shots into the victim. He then fled with his "look-out" man, Quentin Nash, who had had second thoughts about the planned

robbery and entered the store to attempt to dissuade Watkins.

The second death sentence was imposed on September 28, 1984, following a second trial by jury. That death sentence also resulted from a charge of capital murder in the commission of armed robbery and that capital murder charge was also accompanied by charges of robbery and use of a firearm in the commission of a felony. The events leading to those charges were remarkably similar to those which led to the first capital murder charge. In the early morning hours of November 22, 1983, eight days after the first murder, Watkins again entered a convenience store which was occupied only by the clerk, in this instance Carl Douglas Buchanan. Watkins' technique on the second night was essentially identical to that which he had used successfully on November 14. He entered, requested cigarettes, and shot the clerk when he turned to comply with the request. Watkins again went behind the counter, robbed the victim's person, stole the cash drawer, and fired additional shots into the victim. On this second occasion, Watkins fled with his brother, Darnell Watkins, who had waited outside in their car.

At both trials, Watkins was first found guilty of capital murder and then, pursuant to Virginia's bifurcated capital trial procedure, a separate sentencing hearing was held on the issue of punishment. In each case, the jury found both of Virginia's statutory aggravating circumstances -- future dangerousness and vileness -- and unanimously voted to return a verdict of death.

Prior Review Proceedings

As required by Virginia law, Watkins was afforded an automatic appeal to the Supreme Court of Virginia on each capital conviction and death sentence. Following full briefing and oral argument, the convictions and sentences were affirmed in a single published opinion dated June 14, 1985. Watkins v. Commonwealth, 229 Va. 469, 331 S.E.2d 422 (1985). A subsequent petition for a writ of certiorari filed in this Court was denied on March 31, 1986. Watkins v. Virginia, 106 S.Ct. 1503 (1986).

Thereafter, Watkins applied to the Circuit Court of the City of Danville for habeas corpus relief in both cases. Following extensive pleading and a plenary hearing, habeas corpus relief was denied on October 28, 1988.

Watkins appealed the denial of habeas corpus relief to the Supreme Court of Virginia, which refused the petition for appeal by order dated April 13, 1989. Record No. 890124.

REASONS WHY THE WRIT SHOULD BE DENIED

The focus of Watkins' complaint about sentencing instructions has, heretofore, at trial, on direct appeal, and in habeas corpus proceedings, been an assertion that Virginia's statutory verdict form overemphasized aggravating factors and failed to direct the juries' consideration of litigation. Watkins v. Commonwealth, 229 Va. at 490-91, 493; 331 S.E.2d 437-39.

Watkins now attempts to fit his claim into the mold of certain recent decisions by this Court and argues that the jury instructions given at the sentencing phase of his trials were insufficient to assure that the jury considered mitigating evidence. This claim, essentially the same as that litigated at trial and on appeal, is as wholly without merit now as it was then and presents no special reason for the granting of certiorari.

Like the Texas sentencing scheme examined in Jurek v. Texas, 428 U.S. 262 (1976), and the statutes that survived facial challenges in Gregg v. Georgia, 428 U.S. 153 (1976), and Proffitt v. Florida, 428 U.S. 242 (1976), the instructions given the juries at Watkins' sentencing proceedings clearly did not operate "to prevent the sentencer from considering any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor." Penry v. Lynaugh, ___ U.S. ___, ___, 109 S.Ct. 2934, 2946 (1989), quoting Lockett v. Ohio, 438 U.S. 536, 607 (1978) (plurality

opinion).

The instructions given during the sentencing proceedings told the jury, inter alia, as follows:

> If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt either of the two alternatives [future dangerousness or vileness], then you may fix the punishment of the defendant or death, or if you believe from all the evidence that the death penalty is not justified then you shall fix the punishment of the defendant at life imprisonment.

Petition, App. F. (emhasis added). In addition, in its charge to the jury in the Barker case, the trial judge told the jury that "your choice in this case is to consider the evidence which you have heard, the instructions that you have been given by the court, and the argument of counsel, and arrive at a verdict which is in accordance with the contents of these verdict forms...." Id. The verdict form returned by the jury states that the punishment of death was not fixed until the jury had "considered the evidence in mitigation of the offense". Petition, App. G. It is inconceivable that any reasonable juror could have believed that he was precluded from considering any evidence presented. A "contrary interpretation...would have rendered the presentation of the case in mitigation by the defense inexplicable to the jury." Briley v. Bass, 750 F.2d 1238, 1243 (4th Cir. 1984), cert. denied, 470 U.S. 1008 (1985) (a case in which an essentially identical instruction scheme was at issue).

Any rational reading of the instructions demonstrates that the jury was clearly and properly told that they were obligated to consider all evidence presented, including mitigating evidence, in the sentencing calculus. They were instructed that they were under no obligation to return a death sentence regardless of the strength of the aggravating evidence unless they felt that death was the appropriate punishment. In Briley, the Fourth Circuit was confronted with a claim that in a Virginia capital trial sentencing phase, instructions similar to those in this case failed to "inform the jury adequately of its option to recommend life imprisonment and the obligation to consider

mitigating circumstances." The Court found that, "[t]aken as a whole, the instructions leave no doubt that the jury was free to recommend life imprisonment." Briley, 750 F.2d at 1242-1243. Indeed, under Virginia's sentencing statute, "jurors are always free to impose a life sentence, despite a finding of aggravating factors." Clanton v. Muncy, 845 F.2d 1238, 1242 (4th Cir.), cert. denied, 108 S.Ct. 1459 (1988).

The Briley court also said, "[T]he instructions leave the definite impression that the jury was to take into account such evidence as was presented in mitigation and to exercise discretion in reaching a verdict on sentencing, rather than automatically imposing the death sentence upon finding an aggravating circumstance." 750 F.2d at 1244.

That the juries in Watkins' cases appropriately considered all facts in mitigation is further established by the verdict form which affirmatively stated that punishment was fixed at death in each case only after both aggravating factors were found and after the evidence of mitigation of the offenses had been considered. See Briley, 750 F.2d at 1243.

It is virtually impossible that any rational juror would not have returned death sentences in these cases, despite full consideration of the mitigating circumstances. Each sentencing jury was aware that Watkins had committed another capital murder, thus Watkins was the archetypical "future dangerous" defendant. Likewise, the cold, calculated method in which he carried out the crimes, purely for the sake of monetary gain, fully establishes the vileness criterion. Specifically, Watkins committed an aggravated battery upon both victims by firing repeated gunshots into the bodies, apparently to be certain that no live witness would be available to identify him.

It is well established that "the Constitution does not require a state to adopt specific standards for instructing the jury in its consideration of aggravating and mitigating circumstances." Zant v. Stephens, 462 U.S. 862, 890 (1983). In this case, as in Briley, the instruction scheme was sufficient to

permit full consideration of all mitigating evidence and was therefore constitutionally valid. On direct appeal, the Virginia Supreme Court upheld the propriety of the instructions, specifically the verdict form, against a broad-based attack. Watkins v. Commonwealth, 229 Va. 491, 331 S.E.2d at 438. Indeed, as the Virginia Supreme Court found, "[l]isting of aggravating factors in the form verdict without a comparable listing of mitigating factors benefits rather than prejudices the accused [because] [a]ggravating factors are expressly limited...while any circumstances in mitigation may be considered." Id. Because the juries were instructed here, as required by Virginia law, to consider mitigating circumstances before deciding on the sentence, the instructions were constitutionally sound. See Jones v. Butler, 864 F.2d 348, 368 (5th Cir. 1988), cert. denied, 109 S.Ct. 2090 (1989).

CONCLUSION

For the foregoing reasons, this is not an appropriate case for this Court to exercise its certiorari jurisdiction. Accordingly, the respondent prays that this Court will deny the petition for a writ of certiorari.

Respectfully submitted,

MARY SUE TERRY
Attorney General of Virginia

FRANK S. FERGUSON*
Assistant Attorney General

*Counsel of Record

Supreme Court Building
101 North Eighth Street
Richmond, Virginia 23219

CERTIFICATE OF MAILING AND SERVICE

I, Frank S. Ferguson, a member of the Bar of this Court and Counsel for Respondent, hereby certify that I have this 7th day of September, 1989, deposited in the United States mail, first class, postage pre-paid, this Brief in Opposition properly addressed to the Clerk of this Court. I further certify that on this same date I have deposited in the United States mail, first class, postage pre-paid, a copy of this Brief in Opposition properly addressed to Counsel for Petitioner, Steven C. Losch, Esquire, 162 Terrace Place, Brooklyn, New York 11218.

Frank S. Ferguson
Assistant Attorney General